

# **SURVEY ON STATE EXPERIENCE WITH INSTITUTIONAL CONTROLS**

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**(Work in Progress)**

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# States Responding

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- North Carolina
- Ohio
- Texas
- Utah
- Washington

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*Consult the notes for the text of the Q & A.*

## **Experience of Respondents**

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- **Average 11 years Environmental Law**
- **Average 5 years Real Property law**

# INDIVIDUAL IC'S

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## **Deed Notices**

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- **Placed on deed records by landowner (or others?)**
- **Contain information about contaminants, concentrations, locations**
- **Notify public and future owners about risk; may prevent loans**
- **No enforceable requirements**

## **Deed Restrictions (Restrictive Covenants)**

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- **Promise between Buyer and Seller concerning use of real property**
- **May be effective without transfer of property interest**
- **May be enforceable by third parties (e.g., state agencies)**
- **Not widely tested in courts**

# **Administrative Orders**

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- **Most states have authority to issue**
- **Generally do not “run with the land”**
- **May have other limitations**

# Court Injunctions

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- **Effective against named parties**
- **Do not “run with the land”**
- **Difficult to cover technical requirements**
- **May adopt agency order**
- **Limited experience**



## **Environmental Easements**

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- **Effective against parties in privity; “run with the land”**
- **May not be useful to other parties (State?)**
- **Hazardous Substance Easements**
- **Uniform Conservation Easement Act**
  - **Not adopted by all states**
  - **Effectiveness against residual contamination unclear**
- **Little experience**

# **Zoning**

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- **Depends on local cooperation; State has no control**
- **May be a lack of local enforcement**
- **Little experience**

# Land Use Ordinances

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- Similar to Zoning

## **Building Permits**

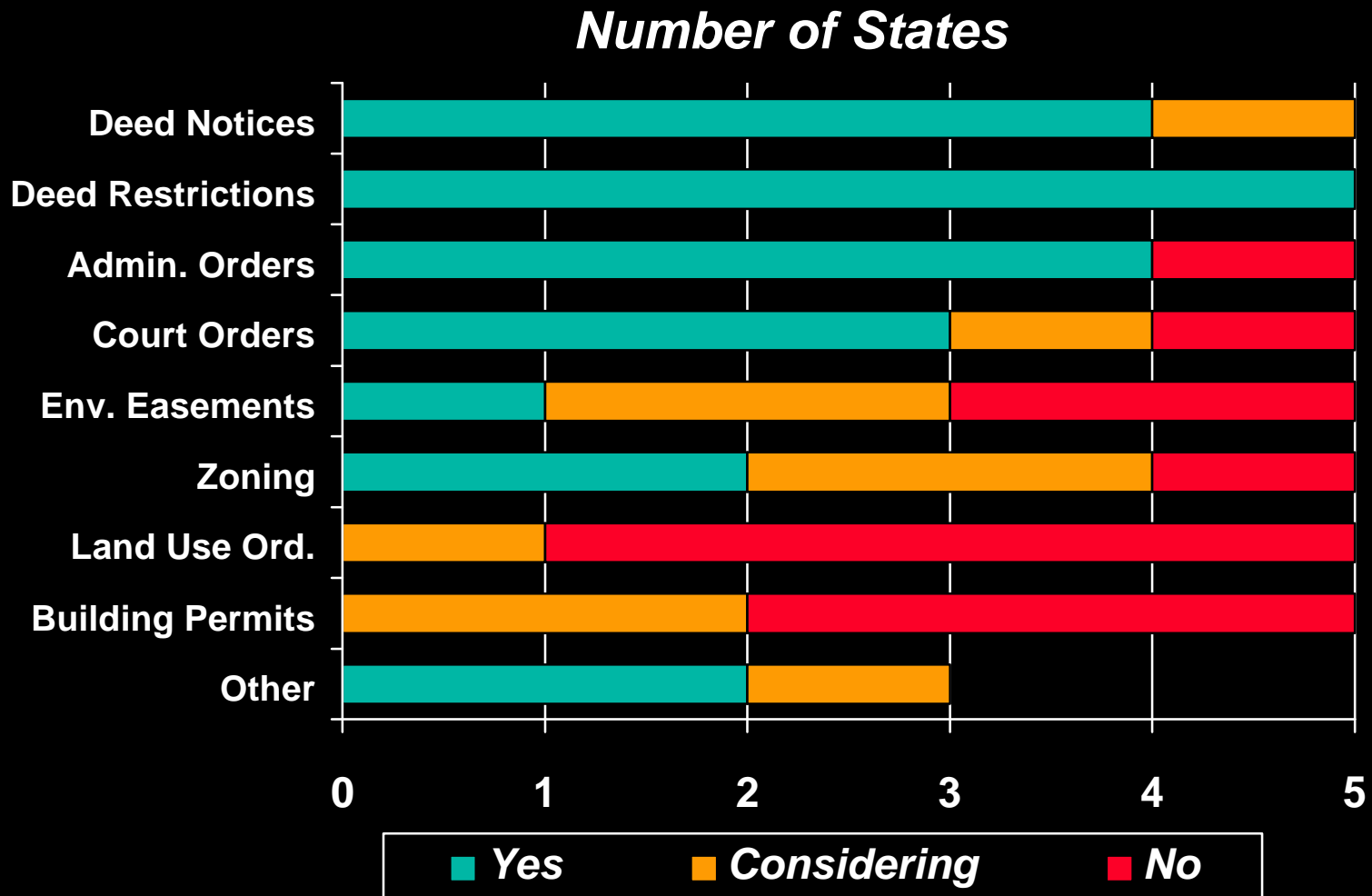
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- **Similar to answers on Zoning**
- **One state uses Building Permits to ensure protection of remedies**

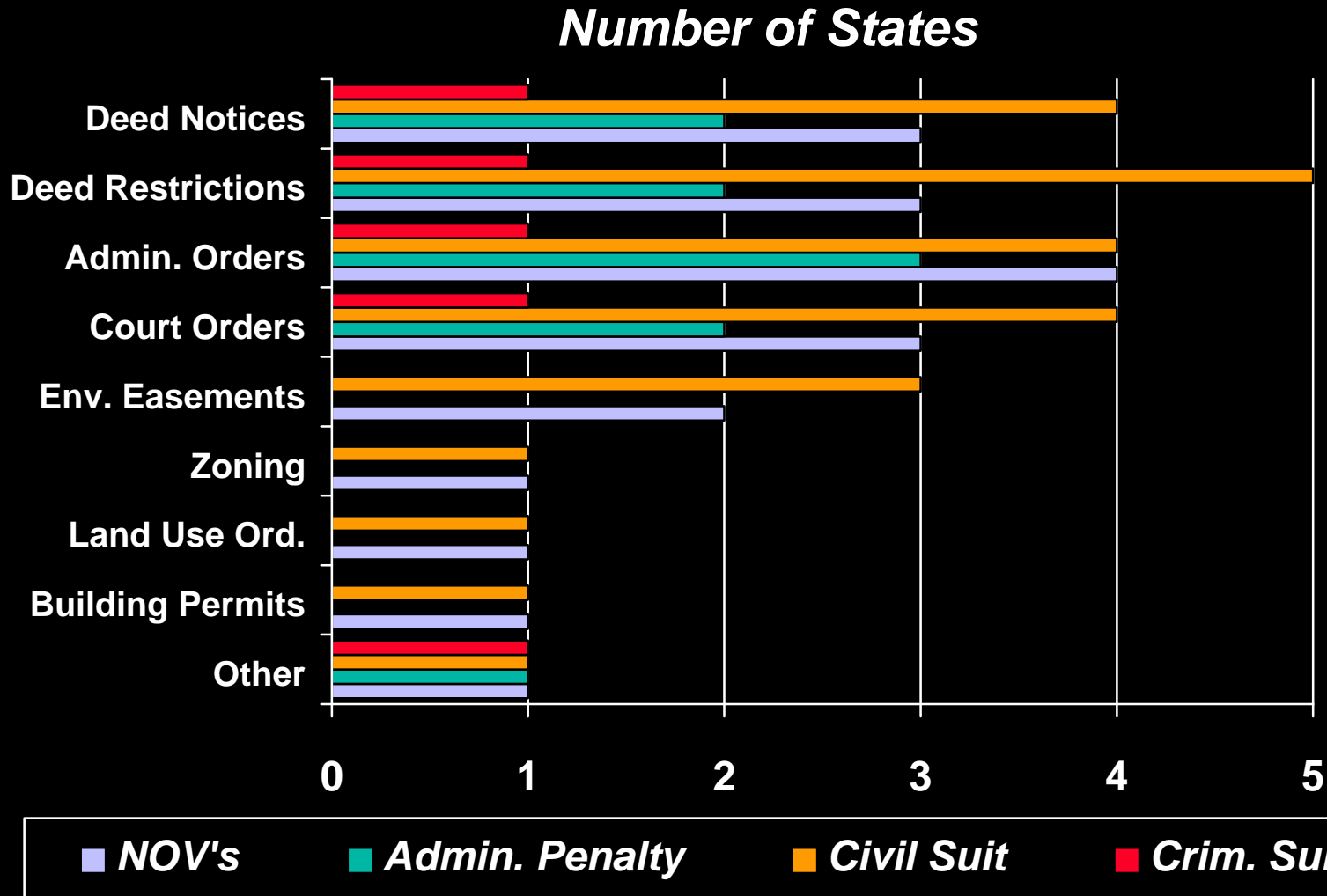
# **COMPARATIVE STATE EXPERIENCE**

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# IC's Used in Environmental Remedies



## Means of Enforcing IC's



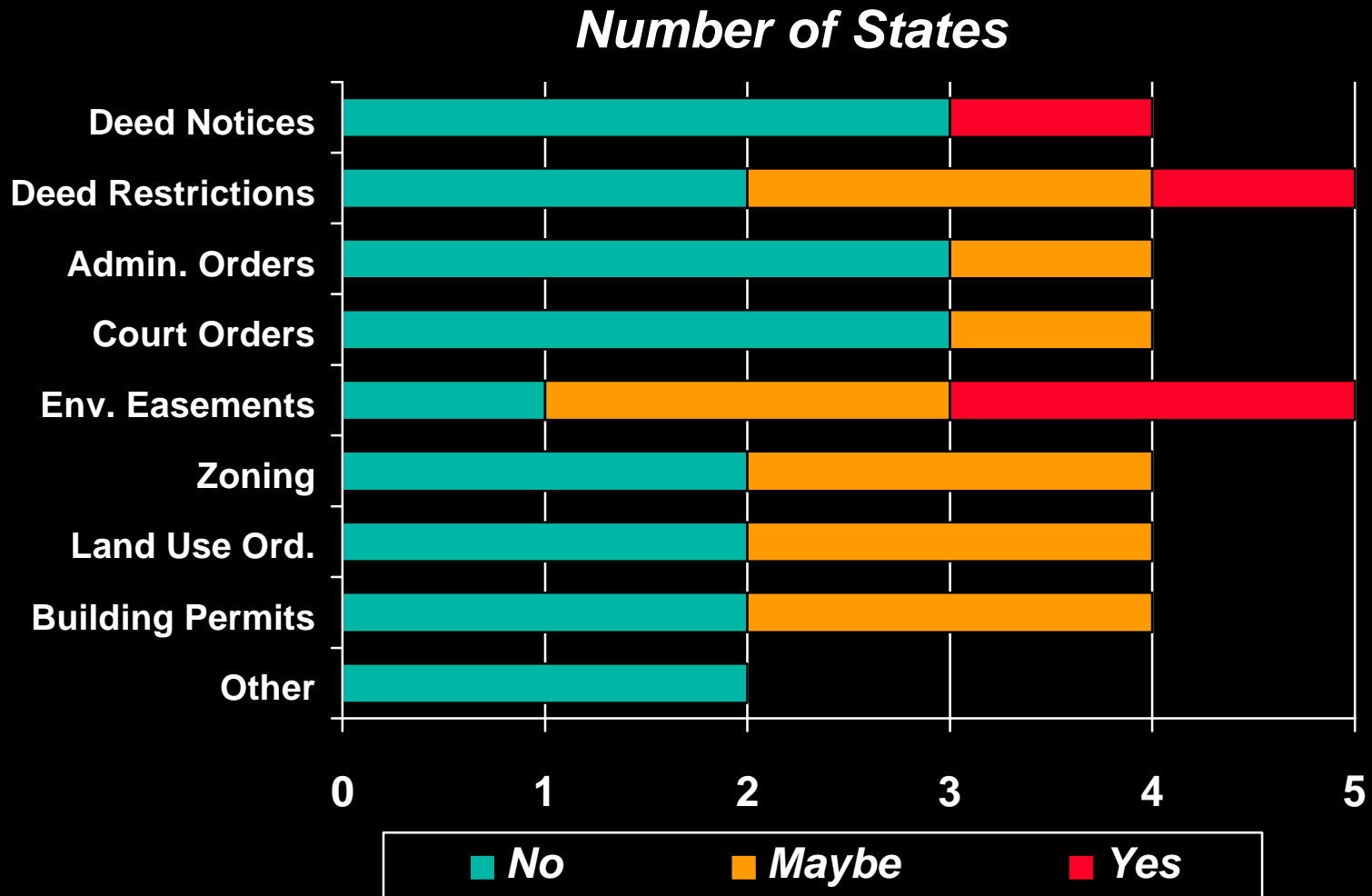
## Authority to Enforce IC's

	<u>Enforced by</u>	<u>Authority</u>
<u>Deed Notices</u>	<u>State Agency</u>	
<u>Deed Restrictions</u>	<u>St. Agcy; Landowner</u>	
<u>Admin. Orders</u>	<u>State Agency</u>	
<u>Court Orders</u>	<u>State Agcy; Court</u>	
<u>Env. Easements</u>	<u>State Agcy; Seller</u>	
<u>Zoning</u>	<u>Local Gov't</u>	
<u>Land Use Ord.</u>	<u>“</u>	
<u>Building Permits</u>	<u>“</u>	
<u>Other</u>	<u>Other</u>	
	 <i>Clear</i>	 <i>Unclear</i>  <i>None</i>



# Limitations on Legal Enforceability

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# **Limitations on Legal Enforceability**

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*Notes, continued.*

# Public Access to Information on IC's

	<u>Location</u>	<u>Feasibility</u>
<u>Deed Notices</u>	<u>Deed Records</u>	
<u>Deed Restrictions</u>	<u>Deed Records</u>	
<u>Admin. Orders</u>	<u>State Agency</u>	
<u>Court Orders</u>	<u>Court Clerk; AGO</u>	
<u>Env. Easements</u>	<u>Deed Records</u>	
<u>Zoning</u>	<u>City Hall</u>	
<u>Land Use Ord.</u>	<u>City Hall/Courthouse</u>	
<u>Building Permits</u>	<u>City Hall</u>	
<u>Other</u>	<u>Other</u>	



*Feasible*



*Undetermined*



*Infeasible*

# **Public Access to Information on IC's**

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*Notes, continued.*

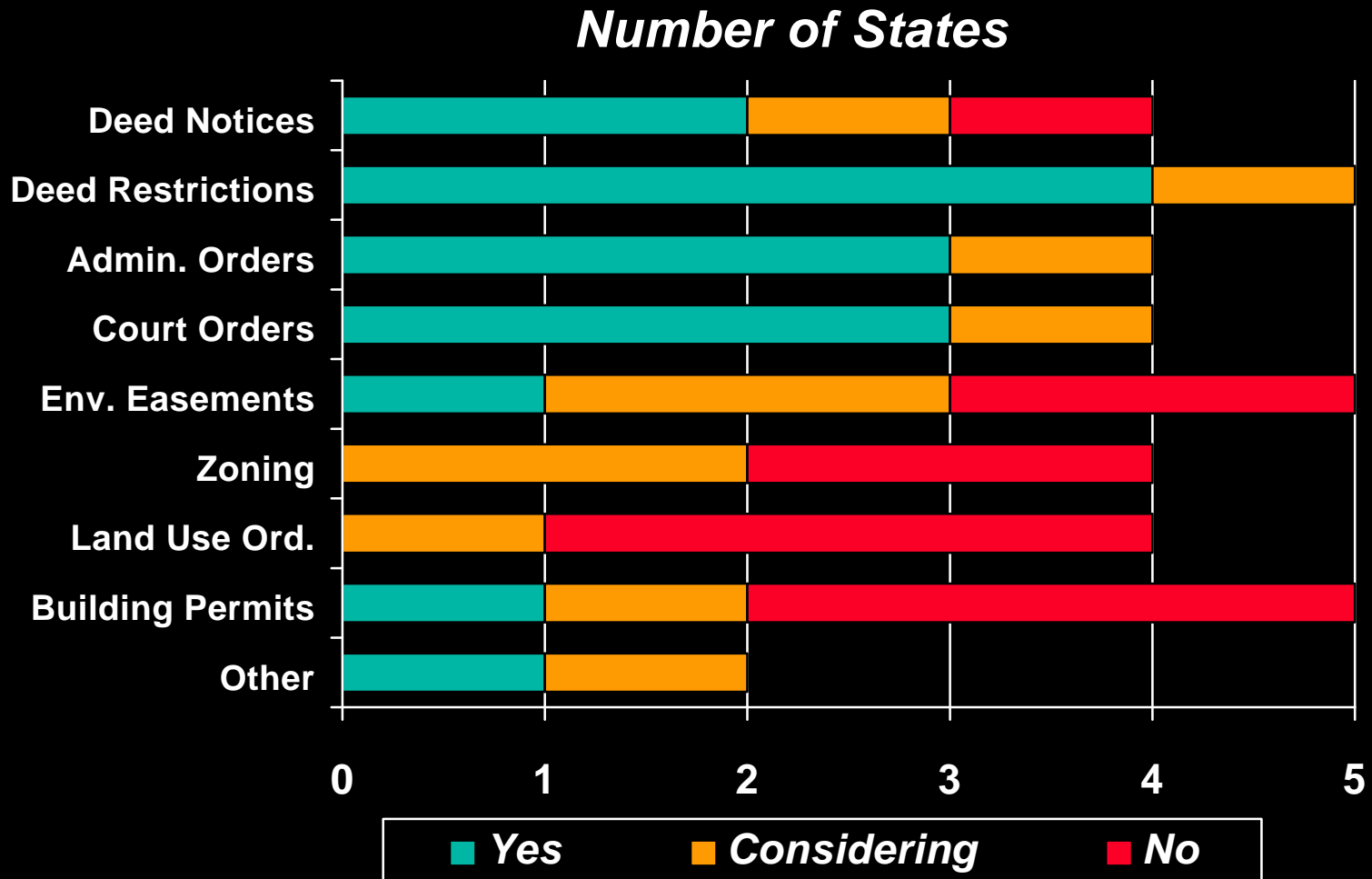
## **IC's Used Together**

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- **Admin Orders requiring Deed Restrictions**
- **Admin Orders requiring Deed Recordation**
- **Consent Decrees requiring Restrictive Covenants**
- **Consent Agreements requiring Deed Restrictions**
- **Court or Administrative Orders requiring Deed Restrictions and, where applicable, Long-Term Operation and Maintenance Agreements**
- **Restriction & Easements**
- **Zoning & Restrictions**

# IC's Used with Engineering Controls

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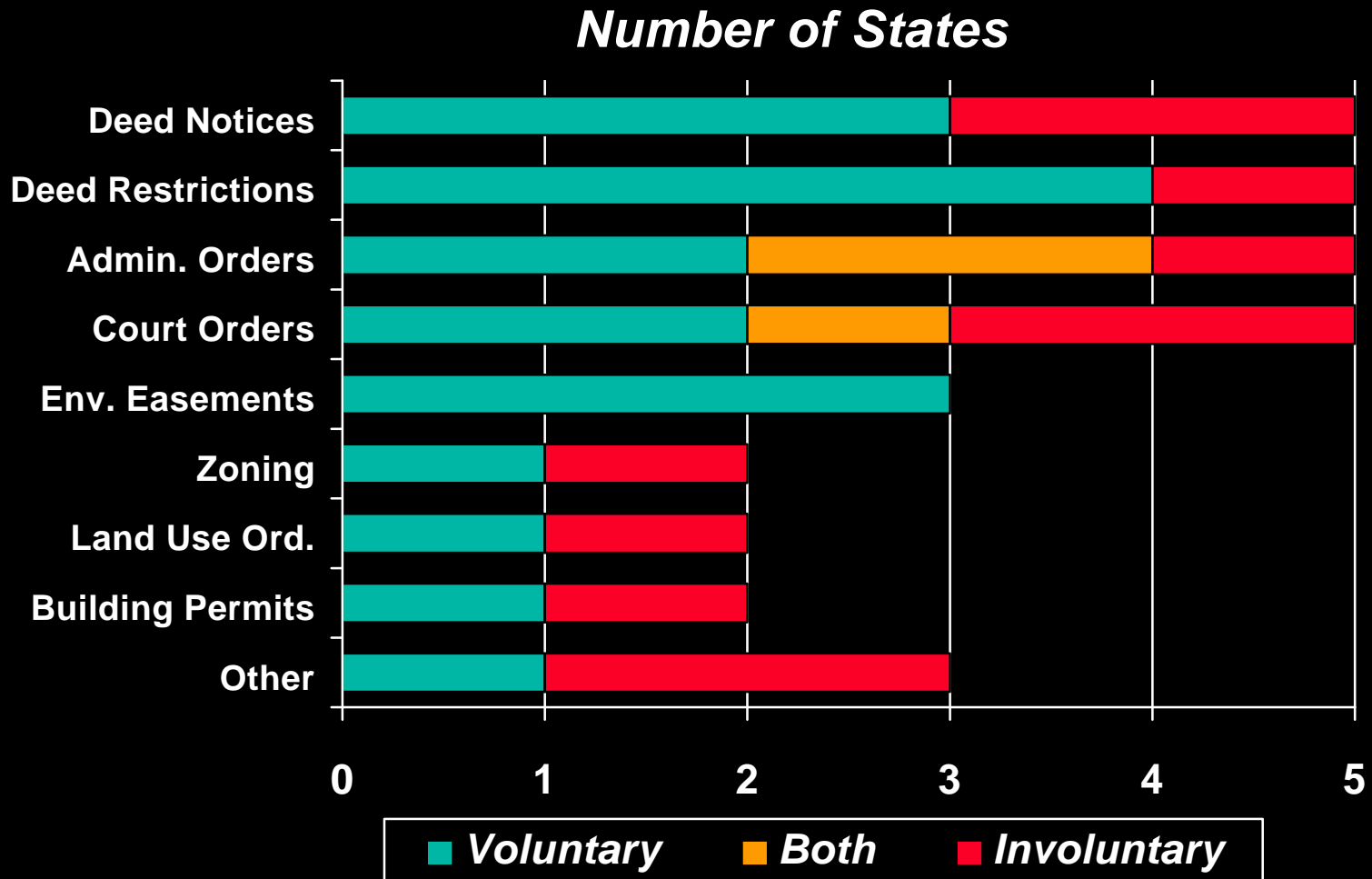


# **IC's Used with Engineering Controls**

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*Notes, continued.*

# IC's Voluntary/Involuntary

















# **IC's Voluntary/Involuntary**

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*Notes, continued.*

# Long-Term Monitoring & Enforcement

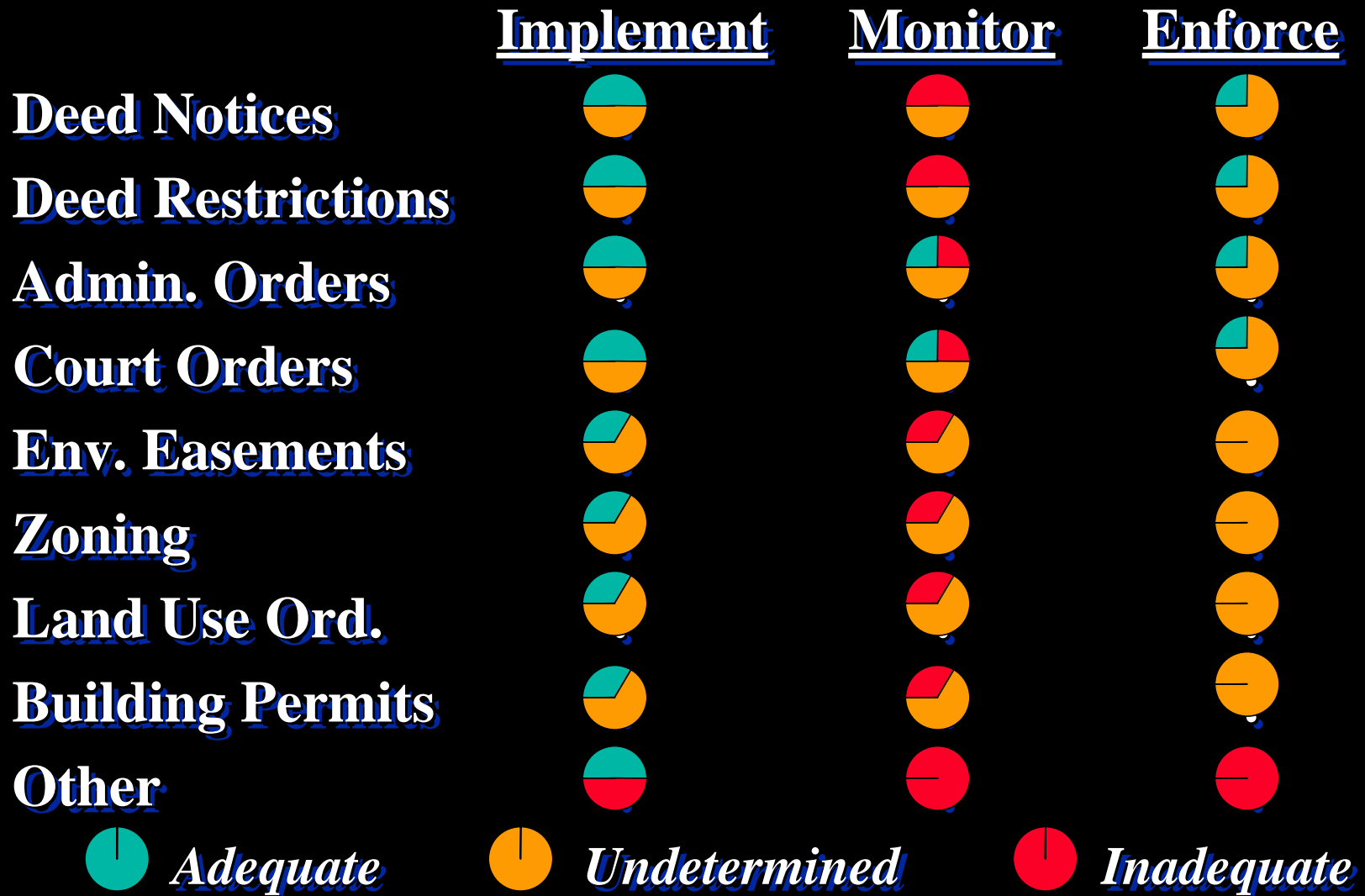
	<u>Agency</u>	<u>Adequacy</u>	<u>Reason</u>
<u>Deed Notices</u>	<u>State Agcy</u>		<u>\$ &amp; staff</u>
<u>Deed Restrictions</u>	<u>Resp. Party</u>		<u>“</u>
<u>Admin. Orders</u>	<u>State/EPA</u>		<u>“</u>
<u>Court Orders</u>	<u>“</u>		<u>“</u>
<u>Env. Easements</u>	<u>Resp. Party</u>		<u>“</u>
<u>Zoning</u>	<u>Local Gov't</u>		<u>“</u>
<u>Land Use Ord.</u>	<u>“</u>		<u>“</u>
<u>Building Permits</u>	<u>“</u>		<u>“</u>
<u>Other</u>	<u>State Agcy</u>		<u>“</u>
 <u>Adequate</u>  <u>Undetermined</u>  <u>Inadequate</u>			

# **Long-Term Monitoring & Enforcement**

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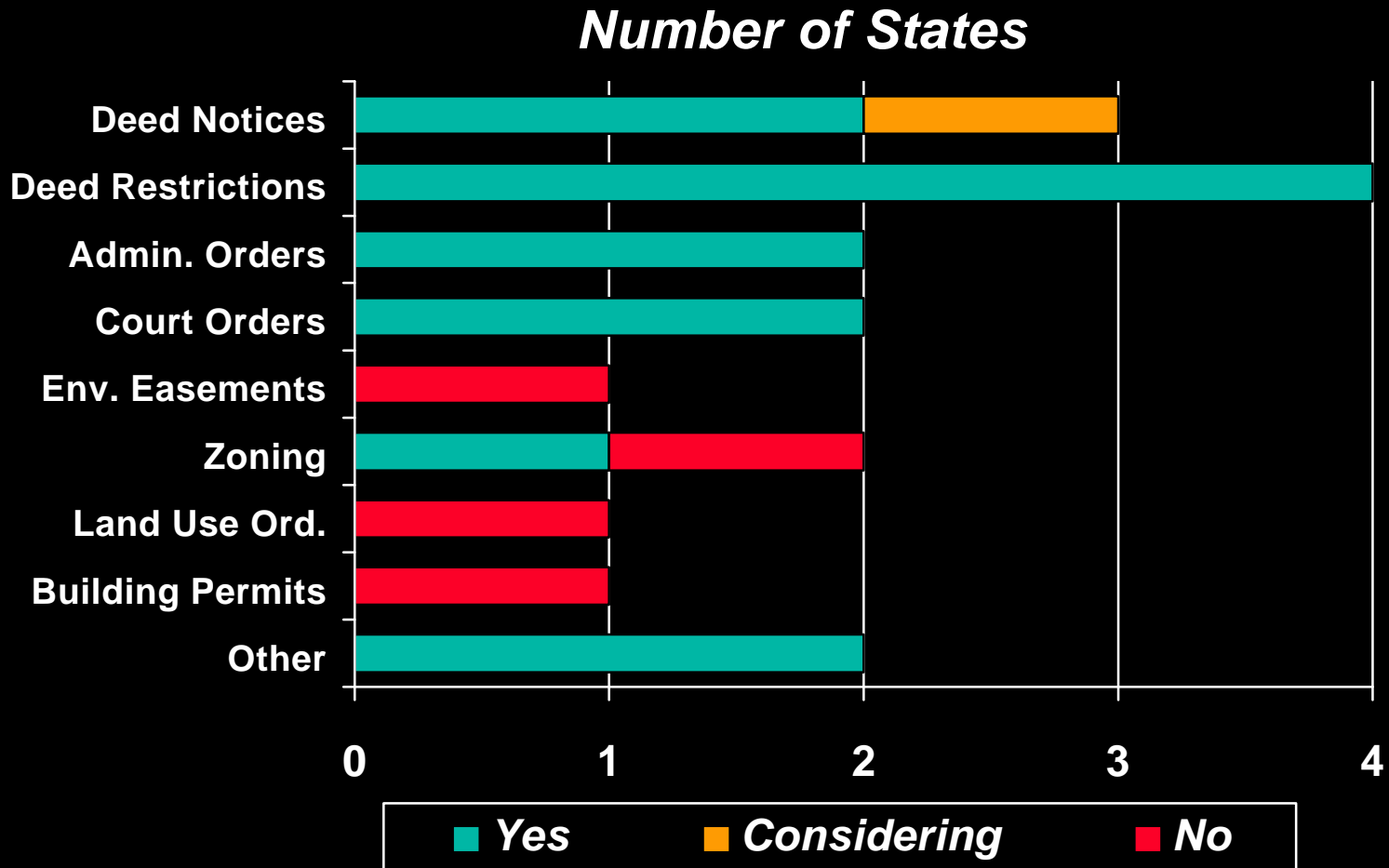
*Notes, continued.*

# Adequacy of Funding for IC's



# Using IC's to Set Cleanup Levels

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## **Effectiveness of IC's in Setting Cleanup Levels**

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- **Cleanup levels may be based on assumptions about future land use**
- **IC's may be required to enforce land use**
- **Inadequate experience to judge effectiveness**

## **IC's at NPL / Non-NPL Sites**

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- **States reported few differences in IC's at NPL sites versus non-NPL sites.**

# Takings

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- **IC's do not constitute compensable takings because they are voluntary.**



## Conclusions

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- Limited data
- IC's have problems of enforceability
  - Court & admin orders do not run with the land
  - Deed notices, restrictions, & easements have legal limitations (e.g., privity)
  - Local measures uncertain
- Multiple controls may be advisable
- Problems with long-term monitoring